

ASSEMBLY BILL

No. 724

Introduced by Assembly Member Shirley Horton

February 17, 2005

An act to amend Section 20133 of the Public Contract Code, relating to public contracts.

LEGISLATIVE COUNSEL'S DIGEST

AB 724, as introduced, Shirley Horton. Design-build contracting.

Existing law requires public entities to comply with certain procedures in soliciting and evaluating bids and awarding contracts for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement. Existing law, until January 1, 2006, permits certain counties, with the approval of the board of supervisors, to enter into design-build contracts, as defined, in accordance with specified provisions. These provisions require that contracts with a cost ranging from \$10,000,000 to \$20,000,000 be awarded to the lowest responsible bidder, and authorizes contracts costing more than \$20,000,000 to be awarded to the lowest responsible bidder or by best value.

This bill would make technical, nonsubstantive changes to those provisions.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 20133 of the Public Contract Code is
- 2 amended to read:

20133. (a) (1) This section provides for an alternative procedure on bidding on building construction projects in excess of ten million dollars (\$10,000,000) applicable only in the Counties of Alameda, Contra Costa, Sacramento, Santa Clara, Solano, Sonoma, and Tulare, upon approval of the appropriate board of supervisors.

(2) For projects with costs ranging from ten million dollars (\$10,000,000) to twenty million dollars (\$20,000,000), inclusive, the contract shall be awarded to the lowest responsible bidder. For projects costing over twenty million dollars (\$20,000,000), the county may award the project using either the lowest responsible bidder or by best value.

(b) (1) It is the intent of the Legislature to enable these counties to utilize cost-effective options for building and modernizing public facilities. The Legislature also recognizes the national trend, including authorizations in California, to allow public entities to utilize design-build contracts as a project delivery method.

(2) The Legislature ~~also~~ finds and declares that utilizing a design-build contract requires a clear understanding of the roles and responsibilities of each participant in the design-build process. The benefits of a design-build contract project delivery system include an accelerated completion of the projects, cost containment, reduction of construction complexity, and reduced exposure to risk for the county. The Legislature also finds that the cost-effective benefits to the counties are achieved by shifting the liability and risk for cost containment and project completion to the design-build entity.

(3) It is the intent of the Legislature to provide an alternative and optional procedure for bidding and building construction projects for these counties.

(4) The design-build approach may be used, but is not limited to use, when it is anticipated that it will: reduce project cost, expedite project completion, or provide design features not achievable through the design-bid-build method.

(5) If the board of supervisors elects to proceed under this section, the board of supervisors shall establish and enforce for design-build projects a labor compliance program containing the requirements outlined in Section 1771.5 of the Labor Code, or it shall contract with a third party to operate a labor compliance

1 program containing the requirements outlined in Section 1771.5
2 of the Labor Code. This requirement shall not apply to any
3 project where the county or the design-build entity has entered
4 into any collective bargaining agreement or agreements that bind
5 all of the contractors performing work on the projects.

6 (c) As used in this section:

7 (1) "Best value" means a value determined by objective
8 criteria and may include, but is not limited to, price, features,
9 functions, life-cycle costs, and other criteria deemed appropriate
10 by the county.

11 (2) "Design-build" means a procurement process in which
12 both the design and construction of a project are procured from a
13 single entity.

14 (3) "Design-build entity" means a partnership, corporation, or
15 other legal entity that is able to provide appropriately licensed
16 contracting, architectural, and engineering services as needed
17 pursuant to a design-build contract.

18 (d) Design-build projects shall progress in a four-step process,
19 as follows:

20 (1) (A) The county shall prepare a set of documents setting
21 forth the scope of the project. The documents may include, but
22 are not limited to, the size, type and desired design character of
23 the buildings and site, performance specifications covering the
24 quality of materials, equipment, and workmanship, preliminary
25 plans or building layouts, or any other information deemed
26 necessary to describe adequately the county's needs. The
27 performance specifications and any plans shall be prepared by a
28 design professional who is duly licensed and registered in
29 California.

30 (B) Any architect or engineer retained by the county to assist
31 in the development of the project specific documents shall not be
32 eligible to participate in the preparation of a bid with any
33 design-build entity for that project.

34 (2) (A) Based on the documents prepared in paragraph (1), the
35 county shall prepare a request for proposals that invites interested
36 parties to submit competitive sealed proposals in the manner
37 prescribed by the county. The request for proposals shall include,
38 but is not limited to, the following elements:

39 (i) Identification of the basic scope and needs of the project or
40 contract, the expected cost range, and other information deemed

1 necessary by the county to inform interested parties of the
2 contracting opportunity, to include the methodology that will be
3 used by the county to evaluate proposals and specifically if the
4 contract will be awarded to the lowest responsible bidder.

5 (ii) Significant factors which the county reasonably expects to
6 consider in evaluating proposals, including cost or price and all
7 nonprice related factors.

8 (iii) The relative importance of weight assigned to each of the
9 factors identified in the request for proposals.

10 (B) With respect to clause (iii) of paragraph (A), if a
11 nonweighted system is used, the agency shall specifically
12 disclose whether all evaluation factors other than cost or price
13 when combined are:

14 (i) Significantly more important than cost or price.

15 (ii) Approximately equal in importance to cost or price.

16 (iii) Significantly less important than cost or price.

17 (C) If the county chooses to reserve the right to hold
18 discussions or negotiations with responsive bidders, it shall so
19 specify in the request for proposal and shall publish separately or
20 incorporate into the request for proposal applicable rules and
21 procedures to be observed by the county to ensure that any
22 discussions or negotiations are conducted in good faith.

23 (3) (A) The county shall establish a procedure to prequalify
24 design-build entities using a standard questionnaire developed by
25 the county. In preparing the questionnaire, the county shall
26 consult with the construction industry, including representatives
27 of the building trades and surety industry. This questionnaire
28 shall require information including, but not limited to, all of the
29 following:

30 (i) If the design-build entity is a partnership, limited
31 partnership, or other association, a listing of all of the partners,
32 general partners, or association members known at the time of
33 bid submission who will participate in the design-build contract,
34 including, but not limited to, mechanical subcontractors.

35 (ii) Evidence that the members of the design-build entity have
36 completed, or demonstrated the experience, competency,
37 capability, and capacity to complete projects of similar size,
38 scope, or complexity, and that proposed key personnel have
39 sufficient experience and training to competently manage and
40 complete the design and construction of the project, as well as a

1 financial statement that assures the county that the design-build
2 entity has the capacity to complete the project.

3 (iii) The licenses, registration, and credentials required to
4 design and construct the project, including information on the
5 revocation or suspension of any license, credential, or
6 registration.

7 (iv) Evidence that establishes that the design-build entity has
8 the capacity to obtain all required payment and performance
9 bonding, liability insurance, and errors and omissions insurance.

10 (v) Any prior serious or willful violation of the California
11 Occupational Safety and Health Act of 1973, contained in Part 1
12 (commencing with Section 6300) of Division 5 of the Labor
13 Code or the federal Occupational Safety and Health Act of 1970
14 (Public Law 91-596), settled against any member of the
15 design-build entity, and information concerning workers'
16 compensation experience history and worker safety program.

17 (vi) Information concerning any debarment, disqualification,
18 or removal from a federal, state, or local government public
19 works project. Any instance where an entity, its owners, officers,
20 or managing employees submitted a bid on a public works
21 project and were found to be nonresponsive, or were found by an
22 awarding body not to be a responsible bidder.

23 (vii) Any instance where the entity, its owner, officers, or
24 managing employees defaulted on a construction contract.

25 (viii) Any violations of the Contractors' State License Law
26 (Chapter 9 (commencing with Section 7000) of Division 3 of the
27 Business and Professions Code), excluding alleged violations of
28 federal or state law including the payment of wages, benefits,
29 apprenticeship requirements, or personal income tax withholding,
30 or of Federal Insurance Contribution Act (FICA) withholding
31 requirements settled against any member of the design-build
32 entity.

33 (ix) Information concerning the bankruptcy or receivership of
34 any member of the design-build entity, including information
35 concerning any work completed by a surety.

36 (x) Information concerning all settled adverse claims, disputes,
37 or lawsuits between the owner of a public works project and any
38 member of the design-build entity during the five years preceding
39 submission of a bid pursuant to this section, in which the claim,
40 settlement, or judgment exceeds fifty thousand dollars (\$50,000).

1 Information shall also be provided concerning any work
2 completed by a surety during this period.

3 (xi) In the case of a partnership or other association, that is not
4 a legal entity, a copy of the agreement creating the partnership or
5 association and specifying that all partners or association
6 members agree to be fully liable for the performance under the
7 design-build contract.

8 (B) The information required pursuant to this subdivision shall
9 be verified under oath by the entity and its members in the
10 manner in which civil pleadings in civil actions are verified.
11 Information that is not a public record pursuant to the California
12 Public Records Act (Chapter 3.5, Division 7, Title 1 of the
13 Government Code) shall not be open to public inspection.

14 (4) The county shall establish a procedure for final selection of
15 the design-build entity. Selection shall be based on either of the
16 following criteria:

17 (A) A competitive bidding process resulting in lump-sum bids
18 by the prequalified design-build entities. Awards shall be made
19 to the lowest responsible bidder.

20 (B) A county may use a design-build competition based upon
21 best value and other criteria set forth in paragraph (2) of
22 subdivision (d). The design-build competition shall include the
23 following elements:

24 (i) Competitive proposals shall be evaluated by using only the
25 criteria and selection procedures specifically identified in the
26 request for proposal. However, the following minimum factors
27 shall collectively represent at least 50 percent of the total weight
28 of consideration given to all criteria factors; price, technical
29 design and construction expertise, life cycle costs over 15 years
30 or more, skilled labor force availability, and acceptable safety
31 record.

32 (ii) Once the evaluation is complete, the top three responsive
33 bidders shall be ranked sequentially from the most advantageous
34 to the least.

35 (iii) The award of the contract shall be made to the responsible
36 bidder whose proposal is determined, in writing, to be the most
37 advantageous.

38 (iv) Notwithstanding any provision of this code, upon issuance
39 of a contract award, the county shall publicly announce its award,
40 identifying the contractor to whom the award is made, along with

1 a written decision supporting its contract award and stating the
2 basis of the award. The notice of award shall also include the
3 county's second and third ranked design-build entities.

4 (v) For the purposes of this paragraph, "skilled labor force
5 availability" shall be determined by the existence of an
6 agreement with a registered apprenticeship program, approved by
7 the California Apprenticeship Council, which has graduated
8 apprentices in each of the preceding five years. This graduation
9 requirement shall not apply to programs providing apprenticeship
10 training for any craft that has been deemed by the Department of
11 Labor and the Department of Industrial Relations to be an
12 apprenticeable craft in the five years prior to enactment of this
13 act.

14 (vi) For the purposes of this paragraph, a bidder's "safety
15 record" shall be deemed "acceptable" if their experience
16 modification rate for the most recent three-year period is an
17 average of 1.00 or less, and their average Total Recordable
18 Injury/Illness rate and average lost work rate for the most recent
19 three-year period does not exceed the applicable statistical
20 standards for its business category or if the bidder is a party to an
21 alternative dispute resolution system as provided for in Section
22 3201.5 of the Labor Code.

23 (e) (1) Any design-build entity that is selected to design and
24 build a project pursuant to this section shall possess or obtain
25 sufficient bonding to cover the contract amount for nondesign
26 services, and errors and omission insurance coverage sufficient to
27 cover all design and architectural services provided in the
28 contract. This section does not prohibit a general or engineering
29 contractor from being designated the lead entity on a
30 design-build entity for the purposes of purchasing necessary
31 bonding to cover the activities of the design-build entity.

32 (2) Any payment or performance bond written for the
33 purposes of this section shall be written using a bond form
34 developed by the county.

35 (f) All subcontractors that were not listed by the design-build
36 entity in accordance with clause (i) of subparagraph (A) of
37 paragraph (3) of subdivision (d) shall be awarded by the
38 design-build entity in accordance with the design-build process
39 set forth by the county in the design-build package. All
40 subcontractors bidding on contracts pursuant to this section shall

1 be afforded the protections contained in Chapter 4 (commencing
2 with Section 4100) of Part 1. The design-build entity shall do
3 both of the following:

4 (1) Provide public notice of the availability of work to be
5 subcontracted in accordance with the publication requirements
6 applicable to the competitive bidding process of the county.

7 (2) Provide a fixed date and time on which the subcontracted
8 work will be awarded in accordance with the procedure
9 established pursuant to this section.

10 (g) The minimum performance criteria and design standards
11 established pursuant to paragraph (1) of subdivision (d) shall be
12 adhered to by the design-build entity. Any deviations from those
13 standards may only be allowed by written consent of the county.

14 (h) The county may retain the services of a design professional
15 or construction project manager, or both, throughout the course
16 of the project in order to ensure compliance with this section.

17 (i) Contracts awarded pursuant to this section shall be valid
18 until the project is completed.

19 (j) Nothing in this section is intended to affect, expand, alter,
20 or limit any rights or remedies otherwise available at law.

21 (k) (1) If the county elects to award a project pursuant to this
22 section retention proceeds withheld by the county from the
23 design-build entity shall not exceed 5 percent if a performance
24 and payment bond, issued by an admitted surety insurer, is
25 required in the solicitation of bids.

26 (2) In a contract between the design-build entity and the
27 subcontractor, and in a contract between a subcontractor and any
28 subcontractor thereunder, the percentage of the retention
29 proceeds withheld may not exceed the percentage specified in the
30 contract between the county and the design-build entity. If the
31 design-build entity provides written notice to any subcontractor
32 who is not a member of the design-build entity, prior to or at the
33 time the bid is requested, that a bond may be required and the
34 subcontractor subsequently is unable or refuses to furnish a bond
35 to the design-build entity, then the design-build entity may
36 withhold retention proceeds in excess of the percentage specified
37 in the contract between the county and the design-build entity
38 from any payment made by the design-build entity to the
39 subcontractor.

(l) Each county that elects to proceed under this section and uses the design-build method on a public works project shall submit to the Legislative Analyst's office, the Senate Committee on Local Government, and the Assembly Committee on Local Government before December 1, 2004, a report containing a description of each public works project procured through the design-build process, and completed on or before November 1, 2004. The report shall include, but shall not be limited to, all of the following information:

- (1) The type of facility.
 - (2) The gross square footage of the facility.
 - (3) The design-build entity who was awarded the project.
 - (4) The estimated and actual length of time to complete the project.
 - (5) The estimated and actual project costs.
 - (6) A description of any written protests concerning any aspect of the solicitation, bid, proposal, or award of the design-build project, including the resolution of the protests.
 - (7) An assessment of the prequalification process and criteria.
 - (8) An assessment of the impact of retaining 5 percent retention on the project.
 - (9) A description of the Labor Force Compliance program and an assessment of the project impact, where required.
 - (10) A description of the method used to award the contract. If best value was the method, the factors used to evaluate the bid shall be described, including the weighting of each factor and an assessment of the effectiveness of the methodology.
 - (11) An assessment of the project impact of "skilled labor force availability".
 - (12) An assessment of the design-build dollar limits on county projects. This shall include projects where the county wanted to use design-build and was precluded by the dollar limitation. It shall also include projects where the best value method of awarding contracts was not used, due to dollar limitations.
 - (13) An assessment of the most appropriate uses for the design-build approach.
- (m) Any county named in this section that elects to not use the authority granted herein may also submit a report to the entities named and in accordance with the schedule in subdivision (l).

1 This report may include an analysis of why the authority granted
2 herein was not used by the county.

3 (n) On or before January 1, 2005, the Legislative Analyst shall
4 report to the Legislature on the use of the design-build method
5 by counties pursuant to this section, including the information
6 listed in subdivision (l). The report may include
7 recommendations for modifying or extending this section.

8 (o) This section shall remain in effect only until January 1,
9 2006, and as of that date is repealed, unless a later enacted
10 statute, that is enacted before January 1, 2006, deletes or extends
11 that date.